

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: BRANDON BRUCE, Petitioner, v. MIDAMERICAN ENERGY COMPANY, Respondent.	DOCKET NO. FCU-03-8 (C-02-287)
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ORDER PARTIALLY AFFIRMING PROPOSED DECISION AND ORDER

(Issued August 25, 2003)

On August 22, 2002, Brandon Bruce filed an informal complaint with the Utilities Board (Board) alleging that MidAmerican Energy Company (MidAmerican) did not follow Board rules with respect to a service line extension to Mr. Bruce's new home south of Milo, Iowa. On November 15, 2002, Board staff issued a proposed resolution of the informal complaint finding that MidAmerican had followed its tariffs. On December 3, 2002, Mr. Bruce requested a formal complaint proceeding.

On January 15, 2003, the Board issued an order docketing the formal complaint and assigning the proceeding to the Administrative Law Judge (ALJ). The ALJ issued a "Proposed Decision and Order" on May 15, 2003. On May 30, 2003, the Consumer Advocate Division of the Department of Justice (Consumer Advocate), Mr. Bruce, and MidAmerican filed notices of appeal of the proposed decision. On

June 12, 2003, the Board issued an order establishing the issues on appeal as required by paragraph 199 IAC 7.8(2)"d" and established a date for filing briefs. MidAmerican and Consumer Advocate filed briefs addressing the issues.

Iowa Code § 476.15(3) provides that on appeal from the proposed decision of the ALJ the Board has all of the power that it would have had if it had initially conducted the hearing, except that it may limit the issues to be decided. The Board may then reverse or modify any finding of fact based upon the preponderance of evidence and may reverse or modify any conclusion of law that the Board finds is in error. In the June 12, 2003, order, the Board set out the issues to be decided on appeal and stated that it reserved the right to address any additional issues it finds to be relevant in consideration of the appeal of the proposed decision. The issues to be decided on appeal are addressed below.

ISSUES TO BE DECIDED ON APPEAL

The issues in the complaint filed by Mr. Bruce and which the Board will address involve the interpretation of the Board's rules on distribution and service line extensions found in 199 IAC 20.3(13). The pertinent parts of that subrule are set out below for reference.

20.3(13) Extensions to customers.

a. Definitions. The following definitions shall apply to the terms used in this rule:

"Advances for construction costs," as used in these subrules, are cash payments, or surety bonds, or an equivalent surety made to the utility by an applicant for an extension, portions of which may be refunded depending on

any subsequent connections made to the extension. Cash payments, surety bonds, or equivalent sureties shall include a grossed-up amount for the income tax effect of such revenue.

* * *

"Contribution in aid of construction," as used in this subrule, means a nonrefundable cash payment grossed-up for the income tax effect of such revenue covering the costs of an extension that are in excess of utility-funded allowances. The amount of tax shall be reduced by the present value of the tax benefits to be obtained by depreciating the property in determining the tax liability.

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"Extension" means a distribution or secondary line extension other than a service line extension.

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"Service line extension," shall mean any secondary line extension on private property serving a single customer or point of attachment of electric service.

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b. Terms and conditions. The utility shall extend service to new customers under the following terms and conditions:

(1) Plant additions. The utility will provide all electric plant at its cost and expense without requiring an advance for construction from customers or developers except in those unusual circumstances where extensive plant additions are required before the customer can be served, or where the customer will not attach within the agreed-upon attachment period after completion of construction. In such instances, the utility shall require, no more than 30 days prior to commencement of construction, the customer or developer to advance funds which are subject to refund as additional customers are attached. A contract between the utility and the customer which requires an advance by the customer to make plant additions shall be available for board inspection.

(2) Advances for construction costs for extensions for customers who will attach within the agreed-upon

attachment period. Where the customer will attach within the agreed-upon attachment period after completion of the extension, the following shall apply:

1. If the estimated construction cost to provide an extension is less than or equal to three times the estimated base revenue calculated on the basis of similarly situated customers, the utility shall finance and make the extension without requiring an advance for construction.

2. If the estimated construction cost to provide an extension is greater than three times the estimated base revenue calculated on the basis of similarly situated customers, the applicant for the extension shall contract with the utility and deposit an advance for construction equal to the estimated construction cost less three times the estimated base revenue to be produced by the customer no more than 30 days prior to commencement of construction.

* * *

(4) Contribution in aid of construction for service line extensions. The utility shall finance and construct either an overhead or underground service line extension without requiring a contribution in aid of construction or any payment by the applicant where the length of the overhead extension to the first point of attachment is up to 50 feet on private property or where the cost of the underground extension to the meter or service disconnect is less than or equal to the estimated cost of constructing an equivalent overhead service extension of up to 50 feet.

Where the length of the overhead extension exceeds 50 feet on private property, the applicant shall be required to provide a contribution in aid of construction for that portion of the service extension on the private property, exclusive of the point of attachment, within 30 days after completion. The contribution in aid of construction for that portion of the service extension shall be computed as follows: [formula omitted]

Where the cost of the underground service extension exceeds the estimated cost of construction an equivalent overhead service extension of up to 50 feet, the applicant shall be required to provide a contribution in aid of

construction within 30 days after completion equal to the difference between the estimated cost of constructing the underground service extension and the estimated cost of constructing an equivalent overhead extension of up to 50 feet.

c. Refunds. The utility shall refund to the depositor for a period of ten years, from the date of the original advance, a pro-rata share for each service attachment to the extension. The pro-rata refund shall be computed in the following manner:

(1) If the combined total of three times estimated base revenue for the depositor and each customer who has attached to the extension exceeds the total estimated construction cost to provide the extension, the entire amount of the advance provided by the depositor shall be refunded to the depositor.

(2) If the combined total of three times estimated base revenue for the depositor and each customer who has attached to the extension is less than the total estimated construction cost to provide the extension, the amount to be refunded to the depositor shall equal three times estimated base revenue of the customer attaching to the extension.

(3) In no event shall the total amount to be refunded to a depositor exceed the amount of the advance for construction made by the depositor. Any amounts subject to refund shall be paid by the utility without interest. At the expiration of the above-described ten-year period, the customer advance for construction record shall be closed and the remaining balance shall be credited to the respective plant account.

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e. Extensions permitted. This rule shall not be construed as prohibiting any utility from making a contract with a customer in a different manner, if the contract provides a more favorable method of extension to the customer, so long as no discrimination is practiced among customers or depositors.

1. **Does 199 IAC 20.3(13) only permit a contract between a utility and a customer for a nonrefundable contribution in aid of construction (CIAC) if the nonrefundable CIAC is “more favorable” to the customer than a contract for a refundable advance for construction?**

The record evidence in this case shows that Mr. Bruce was informed that he could choose between a refundable payment as an advance for construction or a nonrefundable CIAC payment to pay for a distribution line extension to his new house. The CIAC payment was significantly less than the advance for construction and Mr. Bruce chose the CIAC payment. A review of the relevant provisions of 20.3(13), quoted above, shows that there is no specific provision that authorizes a CIAC payment for a distribution line extension.

MidAmerican contended that it could offer the CIAC option under the provisions of 20.3(13)"e" if the option is more favorable than the refundable advance for construction option. MidAmerican then suggests the crux of this issue is not so much whether the option presented is more favorable to the customer but who will decide whether it is more favorable.

Consumer Advocate argues that subrule 20.3(13) does not allow a nonrefundable option for the construction of distribution lines. Consumer Advocate points out that advances for construction are specifically provided as the method of payment for distribution line extensions and that CIAC payments are specifically provided for service line extensions. This difference, Consumer Advocate argues, is logical since the distribution line should be paid for by all customers who attach to the line over the ten years allowed by the rule. The original customer who paid the

advance should then be entitled to a refund or refunds as the additional customers attach to the distribution line.

Consumer Advocate contends that giving a choice to the customer of receiving refunds or not receiving refunds is bad policy. Consumer Advocate contends that the customer will in many cases be in no position to make an informed choice about the potential for additional customers attaching to the distribution line. Consumer Advocate states that the customer will most likely choose the lowest cost option while the utility stands to obtain additional revenue as new customers attach and it does not have to make refunds. Consumer Advocate contends that allowing this choice will lead to customers feeling like they have been taken advantage of by the utility.

Finally, Consumer Advocate argues that the finding by the ALJ that a CIAC payment could be offered for a distribution line extension was not a correct interpretation of subrule 20.3(13). Consumer Advocate points out that the ALJ found support for the finding in the definitions of "advances for construction" and "contribution in aid of construction." Consumer Advocate argues that these definitions cannot control the substantive provisions of the subrule and the unspecific reference to "extension" in the two definitions is not a sufficient basis upon which to find that CIAC applies to distribution extensions.

The ALJ found that 20.3(13)"e" was not the only provision of the subrule that would allow a customer the option of a nonrefundable CIAC payment for a distribution line extension. The ALJ found that the definition of "contribution in aid of construction" refers to extensions, defined as distribution line extensions, and the

other provisions of the subrule do not prohibit the CIAC option. The ALJ found that the better interpretation of the provision is that it allows the customer to choose whether to make an advance for construction (refundable option) or a contribution in aid of construction (the nonrefundable option) when payment for a distribution line extension is required.

The ALJ went on to find that Consumer Advocate's argument (that no one can determine whether the CIAC option is more favorable until the end of the ten-year refund period and therefore the refundable option should be mandated) was unreasonable. The ALJ found that it is up to the customer to decide which option is more favorable at the time of the selection and if later circumstances show the option may not have been the most financially favorable over time, this does not render the original selection invalid.

The Board agrees with the ALJ's findings that subrule 20.3(13) allows a utility to offer a customer a choice between refundable and nonrefundable payments for a distribution line extension and that it is the customer's right to decide which payment is more favorable. The Board finds that this option is authorized by paragraph 20.3(13)"e" as a potentially more favorable method of extension to the customer. The intent of paragraph "e" is to allow the utility flexibility to address those situations where a customer may not be financially able to afford an advance for construction or where the possibility of other customers attaching to the distribution line is questionable. A nonrefundable payment option with a lower up-front cost may be a more favorable option than an advance for construction if the customer is of the

opinion there is little possibility of receiving a refund. The Board finds that the reference to "an extension" in the definition of CIAC is consistent with the flexibility provided by paragraph "e."

The Board recognizes that a close reading of rule 20.3(13), without paragraph "e," would appear to support Consumer Advocate's interpretation. That part of the rule could be read to allow only the refundable payment option for construction of distribution lines. However, this interpretation would have the undesirable effect of increasing customer costs in situations where the customer is likely to be the only user of the new distribution line for the initial ten years, a result that would be unfavorable to many customers

The Board agrees with the ALJ that waiting ten years to determine whether the CIAC option is more favorable is not reasonable. Which option is more favorable is to be determined by the customer at the time the offer is made and subsequent events cannot be used to show that the option chosen was not more favorable. Adoption of Consumer Advocate's argument that regardless of which option the customer chooses, that customer will get a refund if a new customer attaches during the next ten years, renders the choice meaningless. No customer would choose to pay the higher advance for construction if refunds would be paid even if the customer chose the CIAC option.

Finally, it could be argued that the interpretation adopted by the ALJ, and now approved by the Board, allows the last, more general provision of the rule to control the more specific provisions that precede it, that is, the exception would swallow the

rule. Normally, this is not a desirable result, but in these limited circumstances it is an appropriate interpretation since it maximizes customer choice and best serves the public interest, at least until the an revise the language of the specific rules to comport with the Board's ruling in this docket.

Since the Board has found that Mr. Bruce was not entitled to a refund since he chose the CIAC option, the Board finds it is unnecessary to address the other issues set out in the June 12, 2003, order. It would only have been necessary to address those issues if the Board had reversed the ALJ on this first issue. The Board will affirm those parts of the "Proposed Decision and Order" that support this decision. All other findings and conclusions of the ALJ are dicta and the Board is not affirming or reversing those interpretations of subrule 20.3(13). The interpretation of other provisions of subrule 20.3(13) will be made in a case where the issues are required to be addressed.

FINDINGS OF FACT

The Board affirms the Findings of Fact in the "Proposed Decision and Order."

CONCLUSIONS OF LAW

1. The Board affirms paragraph 1 of the "Conclusions of Law" in the "Proposed Decision and Order."

2. The Board considers paragraphs 2 and 3 of the "Conclusions of Law" in the "Proposed Decision and Order" to be dicta and neither affirms, modifies, nor reverses these statements.

3. The Board affirms paragraph 4 of the "Conclusions of Law" in the "Proposed Decision and Order."

4. The Board affirms paragraph 5 of the "Conclusions of Law" in the "Proposed Decision and Order."

5. The Board affirms paragraph 6 of the "Conclusions of Law" in the "Proposed Decision and Order."

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Proposed Decision and Order" issued May 15, 2003 is partially affirmed as described in this order.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 25th day of August, 2003.